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IN THE

Supreme Court of the United States

OCTOBER TERM 1945

LLOYD C. DUNCAN, *Petitioner*, against DUKE PAOA KAHANAMOKU, Sheriff, of the City and County of Honolulu, *Respondent*.	No. 14
HARRY E. WHITE, *Petitioner*, against WM. F. STEER, Colonel, Infantry, United States Army, Provost Marshal, Central Pacific Area, *Respondent*.	No. 15

BRIEF OF AMERICAN CIVIL LIBERTIES UNION AS *AMICUS CURIAE*

AMERICAN CIVIL LIBERTIES UNION
as *amicus curiae*.

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The American Civil Liberties Union is interested in these cases because they present important questions of military control over civilians and of the availability of the writ of habeas corpus. For in each of these cases the military authorities in Hawaii have asserted the right to try civilians in military courts for ordinary crimes. And the Circuit Court of Appeals for the Ninth Circuit has not only approved this assumption of military power but has also approved the ban on the issuance of the writ of habeas corpus imposed by the military. Far-reaching constitutional issues of personal liberty are thus clearly presented.

Trial of civilians by military courts has occurred during several of the wars in which this country has been engaged, but has never been upheld except when expressly authorized by Congress. This occurred only in the Revolutionary War. In the War of 1812 and the Civil War detention and trial of civilians by the military was judicially condemned both because of lack of authorization and because of lack of power even in Congress to authorize such trials except at the seat of war. Since then no attempt has been made to subject civilians to military law until the events in Hawaii which form the basis of the present cases. (We pass, of course, trials of civilians associated with the armed forces pursuant to the Articles of War, or trials in occupied territory.)

It is evident, therefore, that military trials of civilians run counter to the tradition of American life. They can be justified, if at all, only by Congressional authorization or dire necessity. Because we believe that there was here neither authorization nor necessity we are filing this brief.

The Facts

The two cases present a considerable variety of circumstance. White was convicted on August 25, 1942 and sentenced to five years' imprisonment for the alleged offense of embezzlement (R. 7, 15). He challenged the fairness of his trial (R. 6, 7). Duncan was convicted on March 2, 1944 and sentenced to six months' imprisonment for the alleged offense of assault (R. 379-381). In the White case the offense charged had no relation of any kind to the armed forces; in the Duncan case it was charged that the assault was committed on sentries stationed at a naval reservation.

It will be observed that the cases fall into different time periods. The White case raises the question of the right of the military to try ordinary offenses during a period when the civil courts were open for certain pur-

poses, but were forbidden by the military to exercise jurisdiction of criminal cases. But by the time the Duncan case was tried in the military courts the situation had changed. The territorial courts were then functioning completely, with certain reservations to be noted.

The relevant historical facts are these: On December 7, 1941 General Short closed all civil courts and set up military commissions and provost courts with power to try all offenses. At the same time the Governor, with the approval of the President, suspended the writ of habeas corpus and declared martial law. On January 27, 1942 the local courts were authorized "as agents of the Military Governor" to exercise their normal functions, with certain restrictions, which included prohibitions against the trial of criminal cases or the empanelling of grand or petit juries. The situation remained unaltered even when the Battle of Midway, in June, 1942, changed the entire picture of the Pacific War. It was after this that petitioner White was tried.

But no change occurred in the formal situation in Hawaii until February 8, 1943. On that day it was declared that after thirty days the civilian agencies of the territory should resume their functions, with certain exceptions. The military authorities attempted to retain control over criminal prosecutions and certain kinds of civil suits against members of the armed forces, and over criminal prosecutions of all persons for violations of military orders. Only the last of these reservations has any application here. Petitioner Duncan was charged with violation of a military regulation which prohibited an assault upon a member of the armed forces with intent to obstruct him in the performance of his duties. The 1943 proclamation did not purport to lift the suspension of the writ of habeas corpus. That was not done, in so many words, until October, 1944. Since then the writ of habeas corpus has been freely available and the territorial courts function without restriction.

Proceedings in the Courts Below

Both habeas corpus proceedings were tried in the United States District Court of Hawaii. There were full hearings at which high military and naval officers testified. The District Court ruled in each case that the writ of habeas corpus was available to petitioners and that the military courts had no authority to try them, since martial law did not lawfully prevail in the territory and the civil courts were open.

The Circuit Court ruled unanimously that the military courts had jurisdiction. Judges Healy and Garrecht did not consider the availability of the writ of habeas corpus; Judges Wilbur and Mathews expressly ruled that it was not available; Judge Denman objected to any consideration of that issue as unnecessary.

The Circuit Court upheld the validity of White's conviction on the ground that at the time he was tried there was such danger of invasion as to justify martial law. It upheld the denial to the ordinary courts of the right to try criminal cases, primarily on the ground that it would have been impossible to empanel juries because of the large number of citizens of Japanese extraction and also on the ground that summary punishment of all offenders would assist in maintaining general security.

The Circuit Court recognized that these considerations could not apply to Duncan because when he was tried the ordinary courts were functioning. His conviction by a military court was upheld, however, on the ground that he had been charged with an offense against a sentry, thus with a violation of a military order, and that jurisdiction over such offenses might properly be retained by the military because Hawaiian law provided for no special punishment for an assault committed upon a member of the armed forces acting in the line of duty.

Since the institution of these proceedings the writ of habeas corpus has been fully restored in Hawaii. We venture to suggest, therefore, that it is not necessary for this Court to pass on the propriety of the earlier attempts to suspend it. For an affirmance of the Circuit Court decision on that ground alone would merely result in the institution of new proceedings on behalf of both petitioners, proceedings in which, of course, the decision of the Circuit Court on the lawfulness of the convictions would be binding, with need for new applications to this Court for certiorari. No useful purpose would be served by putting petitioners to such trouble, expense and delay. We submit, therefore, that the issue of the propriety of the issuance of the writ has, in effect, become moot and that this Court need concern itself only with the propriety of the military trials.

Summary of Argument

We shall, therefore, present the following points for the consideration of this Court:

1. The military authorities had no power to prevent the civil courts from trying civilians for ordinary offenses (White).

2. After the ordinary courts were functioning the military authorities had no power to reserve to themselves jurisdiction over civilians for violations of military orders except as provided in the Articles of War (Duncan).

3. Petitioner White was denied due process in the military hearing afforded him.

Since the basis for the decision of the Circuit Court was the existence of martial law and supposed military necessity, we shall, before discussing the separate points, consider briefly the general subject of military power over civilians.

I. Concerning military power over civilians.

We start with the proposition that civil authority is paramount in the United States. The Declaration of Independence listed as one of the grievances of the colonies that the King of England had "affected to render the military independent of and superior to the civil power". The first Constitutions of many of the states declared, in varying language, that the military should be subordinated to the civil power: Delaware Article I, §17 (1776); Maryland Art. I, §30 (1776); Massachusetts Part I, §XVII (1780); North Carolina Art. I, §24 (1776); Pennsylvania Art. I, §22 (1776); South Carolina Art. I, §§26, 27 (1778).

That this supremacy should prevail in war as in peace, was illustrated early in our history. In the Revolutionary War itself General Washington never attempted to try civilians by military tribunals except under specific authorization from the Revolutionary Congress (see argument in *Milligan* case by James H. Garfield, later President, 4 Wall. at 50, 51). During the War of 1812 Daniel Webster made an eloquent plea against a proposal to permit the military trial of citizens accused of being spies (Annals of Congress 1813, 1814, Vol. 1, p. 885). The courts of New York denied the right of the military to detain civilians, both in habeas corpus proceedings (*In re Stacy*, 10 Johns. 328) and in actions for damages (*McConnell* v. *Hampton*, 12 Johns. 234; *Smith* v. *Shaw*, 12 Johns. 257). Another interesting case arising out of the War of 1812 is *Johnson* v. *Duncan*, 3 Martins Lou. Rep. O. S. 530, which held that a declaration of martial law by General Andrew Jackson did not have the effect of displacing the ordinary courts.

With this early background in mind we come now to the decisions of this Court. We recognize, of course, the proposition that "the war power of the national government is 'the power to wage war successfully'" (*Hirabayashi* v. *United States*, 320 U. S. 81, 93). On the basis of that doctrine this Court upheld military action which imposed a cur-

few on the West Coast (*Hirabayashi* case, supra) and military orders which required all persons of Japanese ancestry, aliens and citizens alike, to leave their homes (*Korematsu* v. *United States*, 323 U. S. 214). But in each of these cases the action taken by the military had been expressly authorized by Congress and both decisions of this Court rested on that circumstance. It is true that the majority of the Court also upheld the constitutional validity of both these regulations on the ground that they were reasonably related to the war effort, particularly to the prevention of sabotage and espionage. But the Court went no further than to approve the regulations as of the time they were violated, in the spring of 1942.

On the other hand, this Court has repeatedly refused to sanction military or other executive action taken in wartime, although supported by the plea of so-called necessity, when the necessity was not apparent and Congress had not authorized such action. Thus in *Brown* v. *United States*, 8 Cranch. 110, this Court held that the President was without power to seize British-owned property during the War of 1812. In *Mitchell* v. *Harmony*, 13 How. 115, this Court upheld a trial court's charge that private property could be taken by the army under the plea of military necessity only when the danger (in that case that the property might fall into enemy hands) was "immediate and impending and not remote or contingent". (See also *Raymond* v. *Thomas*, 91 U. S. 712, 716). And in *Ex parte Endo*, 323 U. S. 283, this Court held invalid the continued detention of a loyal American citizen of Japanese ancestry.

While military action was not strictly involved in that case the extent of the war power of the executive was. And in measuring that power this Court pointed to the need for preserving the guaranties contained in the Fifth and Sixth Amendments to the Constitution. Finding no congressional warrant for detention the majority of the Court felt it unnecessary to consider the power of both Congress and the President to order such detention.

Although this Court did not, in any of these cases, deal with the extent of constitutional limitations on the war power, there can be little doubt [1] that the Bill of Rights limits that power, as it does every other power of the national government.

It is important to bear in mind that the various restrictions on the power of government contained in the Bill of Rights, having been added to the Constitution as a condition of its approval by many of the states, must be deemed qualifications on the powers granted by the original document. That does not mean, of course, that they have the same meaning under all circumstances. Thus freedom of speech and of religion are preserved in war, as in peace, but the fact of war may result in restrictions on speech not justified in peace. And the due process clause requires fair procedure both in war and in peace, although the fact of war may permit interferences with liberty not proper in peace. So it is with the trial of offenses. Trial by jury is obviously not compatible with trial in a military court. But the fact that the Constitution guarantees trial by jury creates a strong presumption against the validity of military trial of civilians. Thus it is not possible to ignore the Bill of Rights in appraising the war power. This Court must make the proper adjustment between the two. And in making that adjustment it cannot bow to the self-declared law of military necessity.

The precise problem here before the Court, the power to try persons by military tribunals, was first considered by this Court after the Civil War. We pass the various cases which dealt with courts in Confederate territory.[2]

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[1] Despite Justice Frankfurter's suggestion in his concurring opinion in the *Korematsu* case, that a military order "appropriate for conducting war" is ipso facto constitutional. Cf. argument for the United States in the *Milligan* case (4 Wall at 19-21, 102-104), eloquently answered by J. S. Black (id. 78-80).

[2] *The Prize Cases*, 2 Black. 635; *The Grapeshot* v. *Wallerstein*, 9 Wall. 129; *Burke* v. *Miltenberger*, 19 Wall. 519; *New Orleans* v. *New York Mail S.S. Co.*, 20 Wall. 387; *Mechanics and Traders Bank* v. *Union Bank of Louisiana*, 22 Wall. 276; cf. *Leitensdorfer* v. *Webb*, 20 How. 176.

Not only were these only civil cases, but considerations which might even justify the trial of offenders by military courts in enemy or rebel territory in no way apply to such trials in our own territory. For in enemy or rebel territory we are dealing with military government which, of course, supersedes civil government completely. At home there can be no such thing as military government. Military trials are justified only on the theory of martial law. Two problems, therefore, present themselves: Do the facts justify martial law? Do all declarations of martial law justify military trials?

The answers are found in *Ex parte Milligan*, 4 Wall. 2. In that case all the members of the Court held void a military trial because not authorized by Congress. The division among the Justices related to congressional power to set up military tribunals in places where the ordinary courts were functioning, with the majority taking the view that Congress had no such power. Justice Davis expressly rejected the notion, advanced on behalf of the military, that a declaration of martial law *ipso facto* authorized trial by military tribunal. He said (p. 124):

> "If this position is sound to the extent claimed, then when war exists, foreign or domestic, and the country is subdivided into military departments for mere convenience, the commander of one of them can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.
>
> "The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guaranty of the Constitution, and effectually renders the 'military independent of and superior to the civil power'—the attempt to do which by the King of Great Britain was deemed by our fathers such an offence, that they assigned it to the world as one of the causes which impelled them to declare their independence.

> Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable and, in the conflict, one or the other must perish."

Moreover, the majority held that, under the circumstances then existing in Indiana, martial law had not been lawfully declared, saying (p. 127):

> "Martial law cannot arise from a *threatened* invasion. The necessity must be actual and present; the invasion real, such as effectually closes the courts and deposes the civil administration. * * * Martial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction. It is also confined to the locality of actual war."

Chief Justice Chase's definition of the different kinds of military jurisdiction, although in the dissenting opinion, should always be kept in mind (pp. 141, 142):

> "There are under the Constitution three kinds of military jurisdiction: one to be exercised both in peace and war; another to be exercised in time of foreign war without the boundaries of the United States, or intime of rebellion and civil war within states or districts occupied by rebels treated as belligerents; and a third to be exercised in time of invasion or insurrection within the limits of the United States, or during rebellion within the limits of states maintaining adhesion to the National Government, when the public danger requires its exercise. The first of these may be called jurisdiction under MILITARY LAW, and is found in acts of Congress prescribing rules and articles of war, or otherwise providing for the government of the national forces; the second may be distinguished as MILITARY GOVERNMENT, superseding, as far as may be deemed expedient, the local law, and exercised by the military commander, under the direction of the President, with the express or implied sanction of Congress; While the third may be denominated MARTIAL LAW PROPER, and is called into action by Congress, or temporarily, when the action of Congress cannot be invited, and in the case of justifying or excusing peril,

> by the President, in times of insurrection or invasion, or of civil or foreign war, within districts or localities where ordinary law no longer adequately secures public safety and private rights."

The minority disagreed with the majority's statement that Congress had no power to authorize a military trial where the civil courts were functioning because Congress might have declared that trial by military was, nevertheless, essential to national safety under the particular circumstances. It is important to remember that Congress did not so declare with regard to Hawaii during this war, any more than it did with regard to Indiana during the Civil War. And, with regard to the President's power to order military trials without specific congressional approval, Chief Justice Chase said (pp. 139, 140):

> "nor can the President, or any commander under him, without the sanction of Congress, institute tribunals for the trial and punishment of offences, either of soldiers or civilians, unless in cases of a controlling necessity, which justifies what it compels, or at least insures acts of indemnity from the justice of the Legislature."

This Court has had several occasions to review the positions taken in the *Milligan* case. In *Sterling* v. *Constantin*, 287 U. S. 378, Chief Justice Hughes quoted with approval the statement of Justice Davis we have given, (p. 9 *supra*). In *Ex parte Quirin*, 317 U. S. 1, the *Milligan* case was pressed upon the Court as authority against the military trial of members of enemy armed forces landed in this country by submarine for the purpose of causing sabotage. The Court held the earlier case inapplicable because Milligan had never been subject to the law of war, but this Court cast no doubt on the continued vitality of the earlier decision.

The case of *Moyer* v. *Peabody*, 212 U. S. 78, is sometimes cited as though it had a bearing on the question of military

tribunals. (It was cited by Judge Wilbur in the *White* case.) But it dealt only with detention, not punishment. While the opinion in that case contains language indicating that the courts will not look behind a declaration of martial law, the force of that language has been much weakened by the *Sterling* case. There the Court pointed out that even if a declaration of martial law had been properly made, it by no means followed that all action taken thereunder was free from judicial scrutiny. As Chief Justice Hughes said (287 U. S. 400):

> "It does not follow from the fact that the Executive has this range of discretion, deemed to be a necessary incident of his power to suppress disorder, that every sort of action the Governor may take, no matter how unjustified by the exigency or subversive of private right and the jurisdiction of the courts, otherwise available, is conclusively supported by mere executive fiat. The contrary is well established. What are the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."

In the lower Federal courts there have been a number of cases dealing with military trials. Some of these related to transactions in enemy territory.[3] Others related to violations of the Articles of War or the laws of war.[4] None of these cases is helpful in considering the problem now before the Court because of the totally different circumstances. Somewhat closer perhaps are the cases which arose out of disorders in the states (*United States* v. *Wolters*, 268 Fed. 69; *United States* v. *Fischer*, 280 Fed.

[3] *Ex parte Ortiz*, 100 Fed. 955.

[4] See *United States* v. *McDonald*, 265 Fed. 754; *McCune* v. *Kilpatrick*, 53 F. Supp. 80. But in *Hammond* v. *Squier*, 51 F. Supp. 227, a military trial of a seaman was held improper because at the time of the trial Congress had not made the laws of war applicable to seamen in the situation in which the particular individual there found himself.

208). It is doubtful, however, whether the decisions rendered in these cases have any present validity whatever.[5]

State courts have generally restricted the right of the military to try civilians to situations where actual warfare or civil disorder was in progress. Some of the cases[6] anticipated the view later expressed by this Court in the *Milligan* case. Strong expressions upholding the supremacy of civilian authority are to be found in *In re McDonald*, 49 Mont. 454, and *Ex parte Lavinder*, 88 W. Va. 713.[7]

There is also the case of *In re Kalanianaole*, 10 Haw. 29, relied on by the Circuit Court. That case, however, arose at a time when Hawaii was an independent republic, thus before any of the provisions of the United States Constitution had became applicable to that territory. Moreover, in that case the offense charged had a direct connection with the events which called forth the declaration of martial law.

It should be pointed out also that some of the writers on this subject have recognized a distinction between "preventive" and "punitive" martial law. Thus Professor Glenn in The Army and the Law (1st Ed., 1918) said that punitive martial law was not recognized in the United States outside of the theatre of military operation (pp. 185 ff). Lt. Col. Fairman in The Rule of Martial Law (2d Ed., 1943) recognizes that the right of the military to try persons is not a necessary incident of the calling out of troops (p. 169).

A review of these authorities suggests the following general principles applicable to the cases at bar. The

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[5] Lt. Col. Fairman in The Rule of Martial Law (2nd Ed. 1943) says at page 171 that these decisions may "now be completely disregarded". He approved the view expressed in *In re McDonald*, 49 Mont. 454.

[6] *Griffin* v. *Wilcox*, 21 Ind. 370; *In re Kemp*, 16 Wisc. 359.

[7] This case in effect overrules much that was said in *Nance and Mays* v. *Brown*, 71 W. Va. 319. See also *Johnson* v. *Jones*, 44 Ill. 142; *Ex parte Moore*, 64 N. C. 802; cf. *Franks* v. *Smith*, 142 Ky. 232; *Bishop* v. *Vandercook*, 228 Mich. 299.

right to try civilians in military tribunals exists only when expressly granted by Congress or permitted by the law of war. The law of war permits military trials of civilians in enemy territory, and permits such trials of members of enemy armed forces. It has no application to domestic territory. Martial law does not automatically permit trials by military tribunals. Martial law cannot be declared except when disorder or invasion are immediate and impending; it does not continue any longer than the emergency which called it into being. Military necessity justifies no interference with the liberties of the citizens when not authorized by Congress and, even then, not unless the action proposed has a direct and necessary relation to the conduct of the war. While great weight will be given to legislative declaration of necessity, it is the courts which, in the last analysis, must determine whether or not the emergency justified the action taken. It should be borne in mind, in this connection, that there is a vast difference between acts such as the curfew and evacuation orders which were approved by this Court and the orders setting up military tribunals now under consideration. The first were upheld because the orders had been authorized by Congress and because of their relation to the security of the nation at a moment of crisis. The measures taken were but temporary, and have, in fact, been rescinded. Convictions by military instead of civilian courts are of a different character. They have little, if any, relation to security, their consequences remain after any possible need for the original action has disappeared. In the particular cases now before the Court there was, as we shall demonstrate, no lawful basis for trial by military courts.

The suggestion of the Court below that there might be such a thing as "qualified martial law" has no support in history or law and should be quickly quashed by this Court. To permit such a notion to take root in the law would open the door wide to interference with liberty by the executive. So long as the civil authorities are able to carry on—and the functioning of the courts is the best test of this—the

role of the military is merely to assist the civil authorities in the performance of their duties. The mere fact that the executive may consider that there are defects in the civil law cannot justify invoking military authority. Particularly should this be so when the military authorities are given power to act both as legislators and judges. The doctrine enunciated by the Court below would have justified General Jackson in his banishment of part of the population from New Orleans after the retreat of the British, thus running counter to all our traditional view of the proper function of military authority. This matter is important not only in relation to acts of the Army in time of war, but also in relation to acts of the militia in relation to threatened internal disorders in time of peace. We submit therefore that the notion of qualified martial law should be repudiated in its entirety.

II. The military authorities had no power to prevent the civil courts from trying civilians for ordinary offenses.

Petitioner White, a stockbroker, was charged with having embezzled the funds of a customer; the offense occurred in 1942 at a time when the Governor had declared martial law and the military authorities had forbidden the civilian courts from trying criminal cases or empanelling juries. The courts, however, were functioning in other respects. No disorder existed; no war was actually being waged on the islands. Can the military justify this assumption of jurisdiction by closing the courts? Or is not the correct rule that stated by Lt. Col. Fairman, in the Rule of Martial Law (2d Ed., 1943), at page 169, where he said "the ousting of the courts calls for martial rule, not martial rule for the ousting of the courts."

The Circuit Court questioned the claim of petitioners that the courts were "open" on the ground that they were functioning only by permission of the military, as "agents"

of the military governor. That assumption, however, begs the basic question. The validity of military action cannot be tested by the formula adopted by the military but by the facts of the particular situation. And here the fact is that the courts were functioning partially and, but for arbitary military restraint, could have functioned completely. Under the doctrine of the *Milligan* case (4 Wall. 2) it was improper to try civilians in military courts. See also *In re McDonald*, 49 Mont. 454, for an excellent historical review of the limitations on military power.

The only reason advanced in support of the refusal to permit the ordinary courts to try criminal cases relates to the empanelling of juries. Judge Healy intimated that the mere assembling of juries might be an invitation to disorder and that the presence on juries of persons of Japanese ancestry might prevent justice being done. That argument is wholly without validity. If, indeed, there was danger from the gathering of citizens of Japanese descent or their service upon juries, it may be that special regulations concerning them might have been adopted in Hawaii as they were on the West Coast (see *Hirabayashi* v. *United States*, 320 U. S. 81; and *Korematsu* v. *United States*, 323 U. S. 214). Perhaps that might have raised difficulties in the case of a Japanese or a person descended from Japanese, since he might have objected to the exclusion from the jury trying him of members of his own race. But only a person of Japanese ancestry could raise such an issue. Neither of the petitioners here was in that category. Besides, while the inability to get juries might justify prolonged detention without trial of persons thought dangerous, it is no excuse for trial by military tribunal.

III. After the ordinary courts were functioning the military authorities had no power to reserve to themselves jurisdiction over civilians for violations of military orders except as provided in the Articles of War.

Petitioner Duncan was charged in February, 1944, with having assaulted two marine corps sentries on duty at a gate of the naval reservation where he was employed. At that time the territorial courts were functioning in the trial of criminal as well as civil cases. They were no longer acting as so-called agents of the general in command, but as co-ordinate branches of the government. That was recognized by the Circuit Court of Appeals.

The Circuit Court also recognized that the Articles of War do not authorize the military authorities to try civilians for an offense of the kind here involved unless these civilians are "connected" with the armed forces, which it is conceded Duncan was not. The only authority for his prosecution by a military court was a regulation promulgated by General Richardson which prohibited an assault committed on a member of the armed forces with intent to obstruct him in the discharge of his duties. Judge Healy frankly admitted that there was no statutory basis for such a regulation and supported it only as a proper incident of martial law, which the Governor was authorized to declare under §67 of the Organic Act.

In reaching that conclusion, Judge Healy, as we already noted, leaned heavily on the absence from the Hawaiian criminal code of the offense of assaulting a member of the military forces. He noted that, in addition to the ordinary crime of assault (Rev. Laws of Hawaii, 1935, C. 166, §§5651, 5659) there was a crime, punished more severely, for an assault upon an officer with intent to obstruct him in the performance of his duties (id. §5657), but that this statute applied only to assaults on civil or judicial officers, not on military officers. Judge Healy concluded, therefore, that

since the military authorities believed that possibility of an attack on Hawaii continued they could legislate for the protection of military personnel.[8]

That is, indeed, the issue which this Court must determine. Can an army commander present on American soil, for the purpose of protecting it against possible invasion, enact rules for the conduct of civilians and subject them to military punishment in the absence of Congressional authority? The question would seem to answer itself. Never before in our history has such an attempt been sanctioned by the courts. The only judicial authority cited by the Circuit Court was the *Hirabayashi* case, 320 U. S. 81. But that case in no way supports the position taken by the Circuit Court. For Congress had expressly approved the military order there involved, as it has not done here. But, and this is even more important, Hirabayashi was tried in the ordinary courts under all the safeguards guaranteed by the Fifth and Sixth Amendments to the Constitution, not, as here, by a military court without benefit of these guaranties.

Ever since *Ex parte Milligan*, 4 Wall. 2, it has been settled that military tribunals have no jurisdiction over civilians for offenses committed outside the theatre of war in places where the ordinary courts are functioning. Military trial was upheld in *Ex parte Quirin*, 317 U. S. 1, only because the individuals affected were persons in the armed service of the enemy, who, by the Articles of War, or the laws of war were subject to military jurisdiction. The Court there pointed out that in the *Milligan* case a different result had been reached because the offense there charged was of such a character that it was "constitutionally triable only by a jury" (317 U. S. 29).

Nor can the result here reached be supported as an automatic consequence of martial law. That notion was repudiated by all the justices in the *Milligan* case. The

[8] It is curious, however, that the military court gave Duncan a punishment which could have been imposed after conviction for simple assault under §5659.

limited authorization to declare martial law contained in the Organic Law does not change the situation. Moreover, it cannot be the law that martial law can remain in force indefinitely. Here martial law was originally declared in Hawaii on December 7, 1941; and was reaffirmed in February, 1943. These declarations had not been expressly revoked at the time of Duncan's trial in 1944. But the civil government was then functioning in all of its essentials, including the trial of criminal cases. That fact completely destroys the effect of the previous declaration.

After all, martial law is something more than a formality. Its declaration must be justified by the facts. *Sterling* v. *Constantin*, 287 U. S. 378. As was stated in the *Milligan* case (4 Wall. at 127) it can continue only so long as the necessity therefor exists. This Court, in both the *Hirabayashi* and *Korematsu* cases, took pains to indicate that it was upholding the action of the military which had been taken on the West Coast only as of the time the military orders were disobeyed, that is in the spring of 1942, clearly intimating that different conditions might produce a different result. Judged by these standards it is clear beyond the possibility of argument that the situation in February, 1944 did not justify martial law. Indeed, there was no longer any factual basis for its continuance at the time of the February, 1943 proclamation which restored full powers to the civilian agencies of government

Judge Metzger, in the District Court, so held (Duncan R. 397 ff). He stressed the fact that no part of the island of Oahu was, or had for two years been, a battlefield (id. 397) and that the military authorities had not asked Congress to give them the power they claimed was necessary (id. 398). He rejected the notion that because martial law had once been declared with the approval of the President, it must continue until the President withdraws approval (id. 400, 401). These arguments seem unanswerable. They were not in fact answered by the Circuit Court.

Judge Healy said merely that General Richardson and Admiral Nimitz had testified that even as late as March

and April of 1944 there was danger of attack and invasion. Judge Wilbur elaborated this point to the extent of quoting their testimony. It is clear from these quotations that no real invasion was possible, not sufficient to "seize a bridgehead". All that was possible were commando raids or submarine attacks. These, of course, were until the war ended possible against any part of the United States as well. They form no basis for the military trial of civilians, whatever might be the basis for the suspension of the writ of habeas corpus, a question which this Court need not now consider.

Moreover, the mere fact that more than two years had elapsed during which no attempt had been made to get Congress to authorize military trials of any kind shows the absence of any real necessity for such trials. Executive interference with liberty should never be countenanced beyond the period necessary to obtain legislative authorization.

We submit, therefore, that at the time of Duncan's trial the state of martial law previously declared had lost all legal force, that in any event there was no basis for his trial by a military court. If there were reasons for more serious punishment of offenses committed on members of the armed forces than on others the proper body to legislate on this subject was the local legislature or Congress, and not the army.

IV. The military trial afforded petitioner White was lacking in due process.

Petitioner White challenges the constitutional validity of the military trial which was afforded him, even assuming that the military had any right to try him. The District Court did not make any finding on that subject. The Circuit Court of Appeals merely said that there was no basis for any complaint of unfairness.

The Circuit Court did not question the proposition advanced by counsel that military trials must conform to a reasonable standard of fairness and indeed there can be no doubt about the correctness of the proposition.

In *United States ex rel. Innes* v. *Hiatt*, 141 F. 2d 664, Judge Maris considered this question at some length. He concluded that the due process clause is applicable to military trials as to any other, although he recognized that not all the safeguards surrounding criminal trials were applicable. Nevertheless he concluded that unless a military trial conformed to the essential standards of fairness the conviction could be challenged in a habeas corpus proceeding.

This Court has laid down the same general rule for all administrative agencies. See *Kwock Jan Fat* v. *White*, 253 U. S. 454; *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149; *Lloyd Sabaudo Societa Anonima* v. *Elting*, 287 U. S. 329; *Shields* v. *Utah Idaho Central R. Co.*, 305 U. S. 177. There is no reason why the rule should not apply to military trials.

White, in his application for writ of habeas corpus, raised serious issues of the fairness of the proceedings of the military tribunal. He claimed that he was obliged to stand trial on a charge of embezzlement without being informed in writing of the nature of the charge against him (R. 6). He made a showing that the transactions involved required study of complicated bookkeeping entries, for which purpose he needed a lawyer, that the lawyer of his choice was ill and, therefore, he desired a continuance (R. 12-13). He was, however, forced to trial within five days after his arrest (R. 7). The District Court made no ruling on the fairness of White's hearing, finding it unnecessary to pass on that issue in view of its holding that the military court had no jurisdiction at all.

Under these circumstances we submit that White did not receive a fair trial since he was effectively prevented from submitting a defense. Moreover, the trial was so conducted that the conviction could probably not be pleaded as a bar to any other prosecution. Not only was there no written charge, but there was no record of the oral charge (R. 25). Due process was not complied with.

Conclusion

It is respectfully submitted that the writs of habeas corpus should have been sustained and the military convictions voided. In no other way can the supremacy of civil power over the military be maintained.

Respectfully submitted,

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